DOCUMENT RESUME

ED 245 372 EA 016 921

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TITLE Critical Elements of the Employment Relationship.
PUB DATE 83
NOTE 22p.; Chapter 1 of: Legal Issues in Public School Employment (EA 016 920).
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Guides - Non-Classroom Use (055)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Collective Bargaining; *Contracts; Court Litigation; Elementary Secondary Education; *Employer Employee Relationship; Employment Practices; *Labor Legislation; *Legal Responsibility; *School Law; State Legislation; Teacher Certification; Teacher Employment; Teacher Qualifications; Tenure

ABSTRACT

The employment relationship in public schools is governed by constitutional mandates, federal and state statutes, administrative regulations, and contractual obligations. This chapter discusses fundamental aspects of the employment relationship that are influenced by legal principles derived from state law, local district policy and practice, and the unique terms of a particular employment contract. The first part covers employment qualifications of faculty and staff. Issues discussed include loyalty oaths, competitive examinations, professional growth requirements, residency requirements, and certification. The second part discusses the contract of employment, including its relationship to state statutes, board policies and regulatory provisions, and noncontractual duties. The third part defines tenure and covers variables such as probationary periods, tenure eligibility for other school employees, acquisition of tenure by default or acquiescence, and waiver of tenure rights. The final section covers adverse employment decisions such as suspension, transfer, and demotion. A summary follows, defining the school board's scope of authority in terms of the relation between the rule or policy to be implemented and the legally defined mission of the school. (TE)

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Critical Elements of the Employment Relationship

Joseph Beckham

The employment relationship in public schools is governed by constitutional mandates, federal and state statutes, administrative regulations, and contractual obligations. Federal constitutional and statutory provisions that apply across state jurisdictions are treated in other chapters of this book. This chapter will deal with fundamental aspects of the employment relationship, which are influenced by legal principles derived from state law, local district policy and practice, and the unique terms of a particular employment contract.

Although there is great variation in the application of legal standards from one state jurisdiction to another, four elements of the public school employment relationship bear special scrutiny: employment qualifications, contractual obligations, tenure, and discipline.

Qualifications of Faculty and Staff

Each state has adopted its own statutory and regulatory requirements to ensure that only qualified personnel teach or administer in public schools. Generally, the administration of a certification program and the enforcement of other employment qualifications is the responsibility of the state board of education under authorization of the legislature. In most states, professional preparation requirements such as training and

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In: Legal Issues in Public Employment.
Joseph Beckham and Perry A. Zirkel, Editors
Phi Delta Kappa, Bloomington, Indiana
1983

experience are established by the state education agency. State statutes or regulatory provisions may also mandate additional requirements such as good moral character, minimum age, and citizenship.

A local school board usually has discretionary authority to establish other reasonable qualifications for positions in addition to those mandated under state law.[1] In establishing the "reasonableness" of any qualification, the school board should demonstrate that a valid relationship exists between the qualification, the job to be performed, and the legitimate purposes of the public education system.[2]

Loyalty Oaths

The U.S. Supreme Court has considered a number of cases involving the requirement that a loyalty oath be executed by the teacher as a condition of employment. While the high court has observed that a state may require teachers to be of "patriotic disposition,"[3] the Court has struck down loyalty oaths that make membership in an allegedly subversive organization grounds for employment disqualification because such a provision was deemed unconstitutionally vague.[4]

However, the Supreme Court has recognized the constitutionality of a limited loyalty oath as a condition of employment, provided that the oath requires no more than that the prospective employee swear or affirm support for the state and federal constitutions and faithfully discharge the duties of the position to which the employee is assigned. The high court's view is that such oaths are strictly limited to an affirmation of support for constitutional government and a pledge not to act forcibly to overthrow the government.[5]

Competitive Examinations

The use of competitive examinations as a qualification for employment has been upheld where the examination procedures were uniformly applied to all candidates and validly related to job requirements.[6] However, employment qualification requirements involving a standardized examination have been subject to close judicial scrutiny where allegations of discrimination or denial of due process of law are involved.[7] For example, South Carolina requires graduates of teacher-training institutions to make a minimum score on a standardized objective test before receiving a teaching certificate. To ensure that the test was a reasonable measure of subject matter taught in the state's teacher-training institutions, state authorities conducted content validation studies, pilot tested the instrument, and submitted the test items to a review panel. Another review panel determined the minimum score requirement, which was later lowered by the state department of education. Nevertheless, a group of black teacher candidates filed suit, since a

disproportionate number of blacks, particularly those educated in predominantly black colleges, did not meet the minimum score requirement.

A three-judge federal district court reviewed the procedures used to develop and implement the test and found no violation of the equal protection clause of the 14th Amendment or of the applicable standards of Title VII of the Civil Rights Act of 1964. Since the validation procedure demonstrated that the test was related to the content of academic subject matter found in the state's teacher-training institutions, the court regarded the test as rationally related to a valid state purpose, i.e., ensuring that certified teachers would have a minimum level of knowledge necessary for effective teaching.[8]

Professional Growth Requirements

A school board may require that a teacher meet reasonable requirements for professional growth, although the reasonableness of the requirements may be challenged where they exceed scholastic training requirements fixed under state statute. For example, in *Harrah Independent School District* v. *Martin* the U.S. Supreme Court upheld the dismissal of a tenured teacher who refused to comply with a professional growth policy.[9] The policy compelled teachers with a bachelor's degree to earn at least five semester hours of college credit every three years. In previous years the board had denied salary increments to teachers who did not meet the requirement, but when this option was foreclosed by state statute, the board's only recourse was termination.

Residency Requirements

The New Hampshire Supreme Court struck down a requirement that teachers reside within the boundaries of the school district in which they teach. The court held that the restriction violated the individual's fundamental right to equal protection of the laws under the state and federal constitutions. In balancing the denial of a fundamental constitutional right against the state's interest in maintaining the restriction, the court found no reasonable justification for the requirement that a teacher reside near his or her place of duty.[10]

More recently, however, the Sixth Circuit Court of Appeals sustained a residency requirement for public school teachers on the basis of the rational relationship test. The court found the residency requirement reasonable for Cincinnati, because resident teachers would more likely be committed to an urban educational system, would become more involved in activities with district parents and community leaders, and would be less likely to engage in strikes or to refuse to support tax levies.[11]

Certification Requirements for Hiring

Certification requirements may include evidence of specific job experience, satisfactory completion of educational requirements, minimum score requirements on job-related examinations, and such other requirements as are reasonably related to a valid state purpose. In determining whether candidates for certification meet state standards, courts grant considerable discretion to the administrative board charged with making such determinations, and are reluctant to overturn administrative decisions unless "clearly erroneous" or unsupported by substantial evidence.[12]

Certification or licensure ensures that the holder has met state requirements and is therefore qualified for employment in the specialization for which certification is granted. Generally, courts will interpret and enforce the standards established for certification with rigid conformity to literal construction and will decline to intervene where certification is denied.

A Michigan Department of Education rule requiring "at least one year of experience teaching handicapped people" was held to require that certification could be granted only where the teacher could document at least one year of teaching children in a self-contained, special education classroom.[13] Where state regulation required that only certified nurse-teachers could be employed by the school board, the Rhode Island Supreme Court declined to permit the hiring of noncertified nurses for certain limited nursing duties.[14] The Wyoming Supreme Court held that the state board of education is empowered by statute to administer certification of superintendents and acted within its scope of authority in denying certification to a proposed candidate who did not possess sufficient training or experience as a teacher in a recognized K-12 setting.[15]

The U.S. Supreme Court upheld a New York statute forbidding permanent certification as a public school teacher of any person who is not a United States citizen unless that person has manifested an intention to apply for citizenship.[16] The high court recognized a rational relationship between the statute and a legitimate state purpose. In the words of the opinion, the exclusion from certification was justified because:

> Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. . . . Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is critical to continued good health of a democracy.[17]

Dismissal for Lack of Certification

Courts generally uphold dismissals for failure to acquire valid certification. The Washington Supreme Court held that it is the responsibility of the teacher to maintain valid certification, even where local school board officials had insisted that statutory certification could be waived.[18] Although school authorities had knowingly employed the teacher in an area for which she was not certified and assured her that lack of certification was not a problem, the Washington court ruled that the teacher was not entitled to equitable relief when she was dismissed for lack of legal qualifications. Similarly, the New York Court of Appeals sustained the dismissal of a teacher for "incompetency" because he failed to qualify for permanent certification during the statutorily required six-year period.[19]

Where lack of certification is attributable to the teacher, the lack of legal qualification is fatal to the validity of an employment contract.[20] However, where failure to maintain a valid teaching certificate is attributable to bureaucratic delay and other extenuating factors beyond the teacher's control, it has been held that dismissal for lack of proper legal qualification could not be maintained.[21]

Renewal of Certification

Requirements for renewal of certification, particularly when continuing education is required for renewal, have generally been upheld by courts as reasonable. A North Carolina State Board of Education regulation, which provided that certificates would expire after five years and that renewal would be permitted only upon completion of six units of credit during the five-year period preceding renewal, was upheld by that state's highest court.[22] Although contested as unreasonable, the regulation was found to have a reasonable basis in that the teacher's classroom performance would be improved if the teacher broadened his or her knowledge base through continued college coursework.

Certificate Revocation and Suspension

Revocation or suspension of the teaching certificate terminates the holder's right to teach and is distinguishable from dismissal by a local school board, since loss of the certificate forecloses all teaching opportunities within the state. Evidentiary standards and conformity to due process are usually more rigorous where the loss of a teaching certificate is involved.

Immoral conduct related to the commission of, or conviction for, a crime constitutes the most common basis for good cause revocation or suspension of certification. Typically, conviction of a crime is prima

facie evidence of immoral conduct, as is an admission of guilt in a criminal prosecution. Certification revocation was affirmed in a Florida case involving an allegation of moral turpitude. A police officer in pursuit of vandals entered a teacher's residence and observed several marijuana plants. State revocation of the teaching certificate was justified on the basis of substantial evidence of illegal possession.[23] However, where a Florida teacher's certificate was initially suspended based on a police report that the teacher, clad only in trousers and socks, was found with a female student in the backseat of his car, the Florida court ruled that the evidence of impropriety was not sufficient to justify suspension.[24]

Where courts otherwise have been presented with the question of whether or not specific conduct of a teacher constitutes moral unfitness that would justify revocation or suspension of certification, they have generally required that the conduct must adversely affect the teacher's classroom performance or relations with students or colleagues. For example, the California Supreme Court ruled that a teacher who had engaged in homosexual conduct could not have his certificate revoked unless it was shown that the conduct indicated unfitness to teach or otherwise adversely affected performance as a teacher.[25] Incidents of extramarital heterosexual conduct, when balanced against years of highly rated teaching and the support of local board and school personnel, were held insufficient to justify revocation of certificate in Iowa.[26]

The Contract of Employment

The contract of employment is a critically important document that establishes the rights and responsibilities of contracting parties and provides essential guidelines for the administration of public schools. Contracts negotiated between a school district board of education and an employee are subject to provisions of state statutes and administrative regulations as well as express or implied terms of the contract agreement.

As a general rule, the express provisions of an employment contract are strictly enforced by courts. For example, the contract of employment between a teacher and a local Georgia school board stipulated that the employee could not resign without the local board's consent and added that resignation without board consent would authorize the local board to recommend a year's suspension of certificate. The local board refused to accept the teacher's resignation, sought to hold a hearing, then dismissed the teacher for immorality and recommended revocation of certification. On appeal, the teacher invoked the contract provisions that limited the board to recommend suspension for a year due to wrongful termination of the contract. The state school board's decision sustaining

the teacher's position was affirmed on appeal; and the appellate court directed the local board to confine its action to proration of salary for the period served prior to the resignation, recommendation of the one-year suspension of certificate, and placement of a letter of reprimand in the teacher's personnel file.[27] A teacher who signed an agreement that he would not claim tenure by default if granted an additional year of probation was held to his agreement by a New York court. The board had been asked to reconsider denial of tenure and offered the teacher a contract with the option of an additional year as an alternative to nonrenewal. The offer of the board was found to have been made in good faith, and the agreement by the teacher was not considered coerced.[28]

A contract may be considered breached when one party acts unilaterally to change a material element of the original agreement. Under a negotiated agreement, a school district agreed to a salary schedule for a school year beginning August 23 and continuing for 180 days. Following the negotiations, the school board unilaterally altered the starting date of the school year. The change resulted in the loss of five working days, which reduced teachers' salaries under a salary computation formula devised by the board. The appellate court concurred with the trial court's judgment that the board's unilateral act of changing the starting date had effectively denied compensation under the terms of the negotiated agreement, and the board was liable for the salary losses plus interest.[29]

An employee's unforced resignation is normally considered a breach of the contract and prohibits that employee from claiming rights under the contract. A Utah teacher/coach, displeased with his reassignment to another school in the district, resigned. He contended that this resignation was from the school and not the district. Relying on the legal proposition that employment contracts can be altered only by mutual consent, the court held that the employee had resigned from employment in the district and thereby waived all rights to termination procedures.[30]

Several breach-of-contract cases brought against school districts have involved interpretation of oral agreements or implied contractual commitments. As a general rule, oral agreements cannot be considered as a contractual right to continued employment in a school district. When disputes arise, express contractual provisions are favored over implied contracts.

In Alabama, an oral contract between a clerk typist and the school board was held to create no property right for continued employment when her position was eliminated due to budget reductions.[31] Similarly, a Mississippi cafeteria manager could not rely on an oral contract to establish a property right to continued employment; the board could terminate her employment at will.[32]

A school board policy providing additional compensation to vocational education teachers who completed certification requirements was relied on as creating a de facto policy for additional compensation to already certified vocational education teachers in Arizona. The reviewing court rejected this reasoning, holding that where the certified teachers signed contracts, which called for specific salaries, the fact that other teachers were paid more was immaterial.[33]

Relationship of Local Contracts to State Statutes

The subordinate status of a local contractual agreement, when in conflict with the provisions of state statute, has regularly been recognized by courts. In a Pennsylvania case a teacher who had been tenured in one school district sought to require a second district to continue her as a substitute for an employee on leave of absence. The state's intermediate appellate court refused to order reinstatement. Although a professional employee contract had been negotiated, the court interpreted school code provisions defining "substitute" to mean that a professional employee could be hired devoid of rights to hearing and dismissal for cause and that a professional contract would not be controlling.[34] When agents of a New York school district requested that licenses be granted to teachers holding certificates of continuing eligibility for teaching classes for emotionally handicapped children, the court refused to grant the licenses on the grounds that state education statutes provided that no license could be validly issued absent a competitive examination.[35]

An employee who alleges that a school district is failing to comply with state statutory provisions governing employment contracts will normally have to carry the burden of proving noncompliance. California teacher aides who were not renewed due to financially depressed conditions in the district were unsuccessful in establishing a right to continued employment based on state statutes governing notice and layoff of classified employees, since the aides were not considered to come within the protection of the statutes.[36] When prospective principals sought to require a school board to appoint them to positions by rank order as determined by scores on administrative examinations, the Illinois Supreme Court ruled against them by interpreting statutory mandates requiring appointment "for merit only" as permitting the local board to exercise its discretion in the appointment of principals.[37]

Board Policies and Regulatory Provisions

A board of education's power to make and enforce policies applicable to employment agreements is discretionary, but must be exercised within the statutory authority granted to it for purposes related to the

operation of schools. The board's power should be exercised in a reasonable manner and its policies should be uniformly applied throughout the district to avoid any allegation of arbitrary or capricious action.

Numerous cases illustrate the application of administrative regulations in situations involving the contractual rights of employees. In West Virginia an employee handbook promulgated by the state board of education provided that employees who met objective eligibility requirements for a vacant professional position had a right to an interview for the position. The court strictly construed the personnel regulations in favor of an employee who had applied for a position as an assistant state superintendent and ordered that the employee be given an interview before any denial of his application.[38] Similarly, a probationary special education teacher in New York City relied on regulations promulgated by the chancellor and the local board creating a right to be evaluated before discontinuation of her services. The court held that administrative rules that affect substantial rights of employees may not be waived by the local board and ordered evaluation and a new determination regarding continuation of employment.[39]

Numerous school board policies have been held to be reasonable directives for controlling contracts of employment. Failure to comply with a board's request that the teacher submit medical verification of her ability to resume teaching duties was held to be a reasonable basis for denying salary.[40] A school board policy that required teachers who received full pay while on military reserve leave to turn over to the board payments received for such reserve service was upheld in Colorado.[41] However, an Iowa school board policy requiring school employees to take vacation leave while participating in National Guard training was struck down as violating a state statute prohibiting discrimination against employees because of membership in the National Guard.[42]

Rules and regulations applicable to employment conditions in a school district should be spelled out in an employment contract. For example, if an employment contract between a local board and a teacher refers to regulatory provisions governing due process procedures for termination, then those provisions will govern the responsibilities of the parties involved in the event of a termination of employment.[43]

Noncontractual Duties

Certain duties not specified in an employment contract may be required of teachers in addition to regular classroom instruction. Depending on the jurisdiction, duties such as supervision of extracurricular activities, coaching, club sponsorship, monitoring, and related assignments may be assigned without reference to a specific contract obligation. However, noncontractual duties cannot be required where

the activity is unrelated to a school program or educational objective.[44] Under New York law a school board may ask teachers to perform supervisory duties not required under the contract, provided that additional compensation is paid, duties are equitably assigned, and duties are related to respective subject matter fields in which the teachers have expertise.[45] Other courts have held general student supervisory duties to be within the implied requirements of a teaching contract.[46]

Teachers may not refuse to supervise extracurricular activities required as a condition of employment regardless of whether those duties are specified under contract. Courts have construed the refusal to assume extracurricular supervisory duties as an illegal strike or insubordination justifying nonrenewal.[47] The Illinois Court of Appeals has held that teachers could be required by the school board to supervise evening and weekend student activities, even when the rate of compensation for such supervisory services are below that for in-school supervision.[48] The Kansas Supreme Court upheld the validity of an employment contract provision that made acceptance by the teacher of a supplemental contract for supervision of extracurricular activities a prior condition to offering a teaching contract.[49]

An Alabama appeals court upheld a school board's decision dismissing a tenured guidance counselor for insubordination. After a review of evidence, it was established that the counselor refused to meet his assigned duty as a supervisor of children prior to the beginning of the school day. The supervision assignment was rotated among staff, but the counselor felt that guidance counselors should be exempt from this responsibility. A formal reprimand was issued; the counselor responded by filing a grievance. Although the grievance was sustained on a procedural error, the court considered the teacher's conduct in reaching its decision and concluded there was sufficient evidence of a willful refusal to obey a reasonable order of a superior official to justify dismissal.[50]

Tenure

Tenure or continuing contract provisions in state statute laws guarantee a property entitlement to professional staff. The nature and extent of the property right will depend on the interpretation of statute law in a specific jurisdiction, but it is generally accepted that the intent of tenure statutes is to compel procedural due process in dismissal or other adverse employment actions and thus to protect competent professional staff from unjust or arbitrary employment decisions.

Tenure has traditionally been considered the most substantial property right in employment that state statute or board policy could convey to the school employee. However, the security provided by tenured

status is not absolute, as decisions relative to dismissal for cause and reduction in force make exceedingly clear.[51] Perhaps the single most significant benefit conveyed by tenure is the requirement that the school board carry the initial burden to provide sufficient evidence to warrant an adverse employment decision.

Probationary Period

Most tenure statutes specify a period during which the employee holds probationary status. The provisions typically establish dates by which time probationary teachers are to be notified of any decision not to renew their contracts and mandate evaluation of the probationary employee.

The requirement of a probationary period is strictly enforced by state courts, which generally insist that the employee meet the requirement of consecutive years of full-time service. For example, although a Kansas teacher had begun employment the previous year, she was not rehired for a second year, because of uncertain federal funding, until late September in a school year that began on August 22. According to the Kansas Supreme Court, this one-month gap in employment meant that the tenure "time clock" had to be reset, as consecutive service could not include the year of probationary employment prior to the gap.[52]

Tenure rights in most instances apply only to employment in the district where those rights were acquired. After having attained tenure status in one district, a Kentucky teacher resigned his position. He later accepted employment in another district where he taught three years before being notified that his contract would not be renewed. The teacher sued, charging that the board violated his tenure rights. The state supreme court disagreed, ruling that to gain tenure status, a teacher must be reemployed after serving four years in the district[53]

Tenure Eligibility for Other School Employees

The applicability of teacher tenure laws to other professional employees has been the subject of review in a number of appellate decisions. The Missouri Court of Appeals ruled that a school principal was ineligible for permanent status and not protected from nonrenewal under the state's teacher tenure provisions.[54] Under Alabama's law, a school counselor could not invoke the due process protections of the teacher tenure law in contesting his transfer from that position.[55] In Illinois an appellate court ruled that some physical education instructors were improperly suspended because they were protected by tenure and could be reassigned to teaching positions but not to coaching duties, since coaching responsibilities were not protected by the tenure statute.[56]

The Fourth Circuit Court of Appeals has held that a principal re-

assigned to the position of a teacher had no legitimate claim of entitlement to his position as principal, since his continuing contract was silent on the question of reassignment and state statute authorized school boards to reassign administrators without a showing of good cause.[57]

Minnesota statute law on teacher tenure includes all regularly employed principals, supervisors, and teachers. When declining enrollment required a school district to demote some principals, it followed a policy of demotion in inverse order of length of employment as a principal. The Minnesota Supreme Court found this action contrary to the statute and required that demotion and transfer be governed by seniority as an employee in the district.[58]

In Kentucky a court held that a school superintendent is not protected by the teacher tenure law. In this case, a teacher was appointed superintendent to serve the three remaining years of a former superintendent's contract. At the conclusion of the contract term, he was not reappointed as superintendent but instead was assigned a teaching position. The contention that he had served for some three years and had thereby achieved tenured status as superintendent was rejected.[59]

The employment status of a substitute teacher does not necessarily create an entitlement to continued employment,[60] nor can a teacher normally receive credit for substitute service in establishing a claim for tenured status.[61] However, the employee's status as a substitute must be clear and there must be no evidence of an intent to mislead the employee with respect to that status.[62]

Considerations relative to length of service and actual educational functions appear to be primary factors in determining eligibility for tenure. Thus certified remedial and supplemental teachers who were regularly employed on an hourly basis by a board of education in a state-funded and legislatively mandated special education program were held to be teaching staff members within the meaning of New Jersey's tenure law and entitled to acquire tenure.[63]

Acquisition of Tenure by Default or Acquiescence

An issue frequently addressed in court decisions involving tenure is the provision in some states for a so-called tenure by default or acquiescence. New York courts have been particularly lenient with probationary teachers seeking to establish this claim to continuing contract. In two New York cases, school employees successfully claimed they had acquired tenure by default. After serving as a fourth-grade reading teacher on probationary status for three years, an employee received notice that the board was not granting her tenure. However, she continued to teach as a part-time remedial reading teacher for two years and then three additional years at full-time. At that time she was again notified that tenure

would not be granted and her contract would not be renewed. In her appeal, the teacher contended that she had acquired tenure by acquiescence at some point during this eight years of employment. Holding for the teacher, the appellate court remanded the case for determination of her tenure area.[64]

The facts of the other case were somewhat similar. In this instance a tenured assistant principal had accepted reassignment to the position of acting principal only after assurances from an assistant superintendent that this assignment was "to be considered an assignment continuous with your present one." Four years later he became a licensed principal and with the enactment of a new tenure law began serving a new probationary period. At the end of this period the board denied tenure. Overturning this action, the court said that after nine years in the position and because of the earlier assurances, he was entitled to tenure by acquiescence.[65]

Massachusetts had interpreted its tenure statute to grant a probationary teacher tenure by default where notice provisions informing of termination or nonrenewal were not met. A notice of termination, sent by the superintendent rather than the school committee, was held invalid and reinstatement with tenure was accorded to a teacher. The invalidity of the notice was predicated on the statutory requirement that only the school committee was empowered to deny tenure to the teacher.[66]

While decisions granting tenure by default are numerous, two court decisions seem to restrict the application of this extraordinary remedy. Both cases relate to the school employee's status as less than a full-time employee. In Illinois the court held that a teacher who had completed the required probationary period of two consecutive years was not eligible for tenure because the board, for reasons of declining enrollment, hired the teacher on a part-time basis for the third year.[67] In Arizona an appellate court affirmed the decision of a school district that refused to grant tenure to a certified employee who was neither a full-time teacher, a school principal devoting 50% of her time to classroom teaching, nor a supervisor of children's activities.[68]

Waiver of Tenure Rights

Whether an employee may be deemed to have waived tenure rights is dependent on the court's construction of state statutes and employment agreements. The Oregon Supreme Court concluded that a permanent teacher does not retain tenure when changing jobs as the result of a transfer to another district. The plaintiff in this case was a special education teacher who transferred to an intermediate district and after two years was dismissed.[69] However, under Tennessee law, a tenured

teacher who resigns and then is reemployed by the district retains tenure status.[70] While Tennessee school employees do not waive tenure, the district is under no obligation to rehire them.

Under the terms of a Michigan collective bargaining agreement, if a teacher takes a leave of absence but fails to notify the school district of an intent to return, it would be considered a voluntary resignation. Provisions of the state law specified that a tenured teacher could not be denied continuing contract solely by taking a leave of absence, nor could a tenured teacher be terminated without mutual consent. The school district sought to terminate a tenured teacher on leave of absence when the teacher failed to notify the board of her intention to return within a contractually established deadline. The appellate court took note of the fact that the district failed to advise her of the contractual requirement to notify the board of an intent to return and concluded that the teacher's effort to immediately notify the board of that intention once she received notice that the deadline had passed was evidence that the teacher did not consent to termination and had not in fact resigned her tenure position.[71]

A teacher who had achieved tenured status was suspended due to a reduction in staff because of declining enrollment. In accepting part-time employment, the teacher was required to sign a provision that effectively denied any future employment rights beyond the one-year term of the employment contract. After nonrenewal at the end of the stipulated contract period, the teacher contested the provision as invalid when applied to a tenured teacher. The Iowa Supreme Court agreed, interpreting those provisions of the school code dealing with granting tenure and due process rights as being incorporated in the teacher's contract and thus nullifying the "one-year-only" clause. The clause was held not to constitute a waiver of tenure, nor would it be considered as a basis for good cause in nonrenewal of a tenured teacher's contract.[72]

A tenured teacher who suffered severe headaches was advised to take a medical leave and apply for disability retirement. Both were granted, but the teacher presented herself for work after successful neurological surgery and insisted on reclaiming her tenured status. The North Carolina appellate court held the teacher's employment as a career teacher terminated by operation of law when she elected and received the disability retirement benefits.[73]

Other Adverse Employment Decisions

It is well established that courts may review adverse employment decisions of school boards or administrative agencies to ensure compliance with statute law, contractual obligation, or evidentiary standards. While a court is reluctant to substitute its judgment for that of the school board, evidence that a school board acted arbitrarily and

capriciously or failed to make findings of fact in support of its decision would justify court intervention.[74] In addition to dismissal decisions, other adverse employment decisions reviewable by courts include suspension, demotion, transfer, reclassification, reprimand, and failure to promote.

Suspension

The statutes of most states are silent on the authority of school boards to use disciplinary suspension. Nevertheless, there have been some cases challenging whether suspension may be imposed as a penalty for misconduct. In one case a teacher's refusal to submit to a required psychological examination to determine mental competency was a proper basis for a decision to suspend without pay under New York law.[75] However, a California court has ruled that continued suspension for refusal to submit to repeated or additional testing, absent a finding of mental incompetency, is unjustified.[76]

In a case from Illinois, an assistant football coach sought to invalidate a three-day suspension without pay imposed by the school board as a penalty for cursing a student during a football game. The Illinois Supreme Court interpreted the school code, which outlines the procedure to be applied when a board dismisses or removes a teacher, as implying authority to temporarily suspend a teacher, provided a hearing on any proposed suspension is granted.[77]

In a New York case, the state supreme court upheld a school board's imposition of a five-year disciplinary suspension. In overturning a judgment of the appellate court that had reduced the terms of the teacher's suspension to three years, the court noted:

> The courts should show particular deference in matters of internal discipline to determinations made by boards of education which possess a peculiar sensitivity to and comprehension of the complexities and nuances of personnel administration and have responsibility for appropriate accommodation for administration, teachers, pupils, parents and the community.[78]

Suspension may be imposed as a preliminary step in the dismissal process. South Carolina statutes authorize suspension prior to dismissal proceedings. The state supreme court found that a board of education had not violated a teacher's procedural rights by suspending him without providing time to correct deficiencies.[79] The superintendent had informed the teacher by letter of the reasons for the suspension, and the board had accorded him a fair and impartial hearing prior to dismissal.

An issue in many pre-dismissal suspension cases is the employee's right to pay during the period of suspension. An Arizona appellate court ruled that a board of education had no authority to suspend without pay

even though the subsequent dismissal was proper.[80] Similarly, in two decisions, New York appellate courts held that a tenured teacher may not be suspended without pay pending final disposition of charges against him.[81]

Transfer and Demotion

Authority to transfer or demote is normally an implied statutory power of a school board, but challenges to this authority have increased. Frequently, courts are asked to determine whether these forms of school board employment decisions are violative of contractual obligations, arbitrary and capricious, or otherwise related to the denial of a specific constitutional or statutory employment right.

The question of whether a transfer constitutes a demotion that triggers statutory due process procedural protections is often a matter of fact to be determined at trial. Factors to be considered may involve more than a simple determination that the employee's salary remains unchanged. For example, an administrator who had been employed as director of vocational education received notice that, under a reorganization plan, his position as a school administrator was eliminated. He was given a new job description. It was held that this change in the job description, which reduced fringe benefits and made the former administrator subordinate to the principal, when previously the principal had been subordinate to him, constituted a demotion in position. The school board failed to show justification for the demotion, thus supporting the court's conclusion that demotion was arbitrary.[82]

Often, the predominant issue in a transfer case involves the extent of procedural due process required. In Georgia, three statutory considerations govern whether a transfer may be considered a denial of due process employment rights: responsibility, prestige, and salary. In a case involving a school principal's reassignment to director of an alternative school program, the lower court concluded that the principal's transfer reduced his prestige and responsibility, even though he received an increase in pay. The court held that such a transfer required a due process hearing. The Georgia Supreme Court reversed this decision, interpreting the statute to require all three features — less responsibility, less prestige, and less salary — not just one or two of them.[83]

The primary issue in a number of cases is whether or not the transfer was a demotion. The Pennsylvania Commonwealth Court ruled that an elementary principal had been demoted when he was reassigned to "auxiliary duties" in another elementary school, even though his salary remained the same. The court reasoned that he was no longer in complete charge and was no longer in a singular position.[84] Similarly, a tenured Massachusetts principal was held to have been demoted when the school

committee assigned him full-time classroom teaching duties at a lower salary.[85]

Principals in Florida and Tennessee were unable to establish that their transfers were demotions. A Florida principal whose status was changed to "program coordinator" was unsuccessful in his claim that his new position was not similar and his salary was not the same, conditions necessary to grant a hearing according to statute.[86] In another case the principal's title and base salary remained unchanged, but since he now headed a smaller school with fewer teachers, his total compensation relative to fringe benefits was less. The court rejected his argument that the transfer required additional due process protections.[87]

If a transfer or demotion is a substantial penalty imposed for improper conduct, full due process rights should be accorded the employee. The Fourth Circuit Court of Appeals affirmed a North Carolina federal district court's decision upholding demotion of a "career" teacher to the position of "tutor." The demotion was a disciplinary penalty imposed because of an incident in the teacher's classroom in which she read to the class a confiscated student note containing three "vulgar colloquialisms." The court found no merit to the employee's claim that her First and 14th Amendment rights were violated. State statutes provided adequate notice of proscribed conduct, the hearings accorded met due process requirements, and the evidence refuted allegations of racial discrimination.[88]

All adverse employment cases require a prima facie proof that the employment decision is sufficiently adverse to justify a legal remedy. A claim that a change in teaching schedule was substantially motivated by a desire to retaliate against the teacher's exercise of free speech was not enough to establish a claim for violation of First Amendment rights. While a teacher's activity as a representative of her teaching association was considered to be protected under the First Amendment, a change in her teaching schedule was not considered a sufficient legal injury justifying relief. The federal district court reasoned that if a sanction is to be pleaded, it must be shown that the consequence of the sanction would have a chilling effect on the exercise of constitutionally protected rights. In the absence of a sufficiently adverse personnel action, such as reduction in rank or loss of pay, a teacher's claim would not be subject to court action, even though the administrative decision could be substantially motivated by a desire to curb the exercise of substantive constitutional rights.[89]

An employment decision may be sufficiently adverse to require that a school board provide a defensible basis for its decision, even when the decision involves a failure to promote. An Iowa statutory preference for school district employees did not justify the promotion of a school employee to a position as audiologist, where the evidence demonstrated

that he possessed the requisite technical skills but lacked the ability to cooperate and coordinate his activities with others, was often abusive and insulting in professional relations, and contributed to discord and dissidence among staff.[90]

In an unusual administrative law case from New York, a teacher who was officially reprimanded by the school board for misconduct sought to overturn the board's decision as an excessive penalty. The appellate court took note that the reprimand was related to conviction for the felonious offense of drug possession and concluded that the reprimand was not excessive. Rather it was so lenient as to be arbitrary and capricious and an abuse of the board's discretion. The court ordered the board to reconsider its decision, presumably to enforce a more stringent penalty.[91]

Summary

Educators must be alert to the statutory mandates, regulatory provisions, and contractual obligations that are unique to their particular state or local school district. Local school boards must take care to exercise power within the scope of delegated constitutional or statutory authority for valid state purposes. Whether that purpose relates to the efficient management of the public schools, the education of pupils, the maintenance of appropriate discipline, or any other recognized state purpose, the principle of reasonableness should guide the deliberations of the school board or its agents.

Every aspect of the employment relationship, whether related to the evaluation of professional qualifications, the administration of contractual agreements, the awarding of tenure, or the determination of appropriate discipline, should emphasize the rational relationship between the legally defined mission of the public school and the rule or policy to be implemented. Judges will insist that public school officials be guided by principles of fairness, reasonableness, and good faith in dealings with public school employees.

Courts remain reluctant to intervene in the employment policies of school boards unless the employee can make an initial showing that the employment practice goes beyond the authority delegated to the board, was arbitrary or capricious, or otherwise violated the constitutional or statutory rights of the public school employee. If the employee is successful in carrying this initial burden of proof, then the school board must show that the policy or practice in question is within the scope of its authority and is fairly and reasonably applied. Consequently, it is important for the school board to have a clearly articulated basis for employment policies and to establish fundamental guidelines, through consultation and deliberation, to ensure fair and reasonable implementation of that policy.

Footnotes

1. *See, e.g.*, Steiner v. Independent School Dist., 262 N.W.2d 173 (Minn. 1978).
2. *See, e.g.*, Lenard v. Board of Educ. of Fairfield, 384 N.E.2d 1321 (Ill. 1979); Chester v. Harper Woods School Dist., 273 N.W.2d 916 (Mich. App. 1979).
3. Pierce v. Society of Sisters, 268 U.S. 510, 519 (1925).
4. *See, e.g.*, Weiman v. Updegraff, 344 U.S. 183 (1952). For a discussion of substantive constitutional rights, *see* chapter 3 *infra*.
5. *See, e.g.*, Cole v. Richardson, 405 U.S. 676 (1972); Connell v. Higginbotham, 403 U.S. 207 (1971).
6. *See, e.g.*, Council of Supervisors Ass'n v. Board of Educ., 297 N.Y.S.2d 547 (Sup. Ct. App. Div. 1969); Nelson v. Board of Examiners, 288 N.Y.S.2d 454 (Sup. Ct. App. Div. 1968).
7. *See, e.g.*, Armstead v. Starkville Municipal Separate School Dist., 461 F.2d 276 (5th Cir. 1972); Johnson v. Matzen, 210 N.W.2d 151 (Neb. 1926).
8. United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd*, 434 U.S. 1026 (1978).
9. 440 U.S. 194 (1979).
10. Donnelly v. Manchester, 274 A.2d 789 (N.H. 1971).
11. Werdwell v. Board of Educ. of Cincinnati, 529 F.2d 625 (5th Cir. 1976); *see also* Park v. Lansing School Dist., 233 N.W.2d 592 (Mich. 1975); Mogle v. Sever Cty. School Dist., 540 F.2d 478 (10th Cir. 1976).
12. *See, e.g.* Bay v. State Bd. of Educ., 379 P.2d 558 (Ore. 1963); In re Masiello, 138 A.2d 393 (N.J. 1958); Antell v. Board of Educ., 195 N.Y.S.2d 959 (Sup. Ct. 1959).
13. Golonka v. Michigan Dep't of Educ., 308 N.W.2d 425 (Mich. App. 1981).
14. Cranston Teachers' Ass'n v. Cranston School Comm., 424 A.2d 648 (R.I. 1981).
15. Wyoming State Dep't of Educ. v. Barber, 649 P.2d 681 (Wyo. 1982).
16. Ambach v. Norwick, 441 U.S. 68 (1979).
17. *Id.* at 78-79.
18. Granus v. Melrose-Mindoro Joint School Dist., 254 N.W.2d 730 (Wash. 1977).
19. Linton v. Board of Educ. of Yonkers, 417 N.Y.S.2d 246 (1979).
20. *See* Brubaker v. Community Unit School Dist. No. 16, 4 Ill. Dec. 853 (Ill. App. 1977).
21. Pintek v. Elk Lake School Dist., 360 A.2d 804 (Pa. Commw. 1976).
22. Guthrie v. Taylor, 185 S.E.2d 193 (N.C. 1971).
23. Adams v. State Professional Practices Council, 406 So. 2d 1170 (Fla. Dist. Ct. App. 1981).
24. Jenkins v. State Bd. of Educ., 399 So. 2d 103 (Fla. Dist. Ct. App. 1981).
25. Morrison v. State Bd. of Educ., 82 Cal. Rptr. 175 (1969).
26. Erb v. Iowa State Bd. of Pub. Instruction, 216 N.W.2d 339 (Iowa 1974).
27. Cobb Cty. Bd. of Educ. v. Vizcarrondo, 293 S.E.2d 13 (Ga. App. 1982).
28. Juul v. Board of Educ. of Hempstead, 428 N.Y.S.2d 319 (Sup. Ct. App. Div. 1980).

29. Monroe Cty. Commun. School v. Frohliger, 434 N.E.2d 93 (Ind App. 1982).
30. Stringham v. Jordan School Dist., 588 P.2d 698 (Utah 1978).
31. Tripp v. Hall, 395 So. 2d 33 (Ala. 1981).
32. Brantley v. Surles, 404 So. 2d 1013 (Miss. 1981).
33. Rothery v. Cantrell, 635 P.2d 184 (Ariz. App. 1981).
34. Bitler v. Warrior Run School Dist., 437 A.2d 481 (Pa. Commw 1981).
35. Bloomberg-Dubin v. Board of Educ., 439 N.Y.S.2d 956 (Sup. Ct. App. Div. 1981).
36. California School Employees v. King City Union Elementary School Dist., 172 Cal. Rptr. 368 (Cal. App. 1981).
37. Maiter v. Chicago Bd. of Educ., 415 N.E.2d 1034 (Ill. 1980).
38. State *ex rel.* Wilson v. Truby, 281 S.E.2d 231 (W.Va. 1981).
39. Lehman v. Board of Educ., 439 N.Y.S.2d 670 (Sup. Ct. App. Div. 1981).
40. Kurzius v. Board of Educ., 438 N.Y.S.2d 824 (Sup. Ct. App. Div. 1981).
41. Colorado Springs Teacher's Ass'n v. School Dist. No. 11, 622 P.2d 602 (Colo. App. 1980).
42. Belwey v. Villisca Commun. School Dist., 299 N.W.2d 904 (Iowa 1980).
43. *See* Rhodes v. Board of Educ. of Person Cty., 293 S.E.2d 295 (N.C. App. 1982).
44. *See, e.g.* Pease v. Millcreek Twp. School Dist., 195 A.2d 104 (Pa. 1963).
45. Parrish v. Moss, 106 N.Y.S.2d 577 (Sup. Ct. 1951).
46. *See, e.g.*, Johnson v. United School Dist., 191 A.2d 897 (Pa. 1963); McGrath v. Burkhard, 280 P.2d 864 (Cal. App. 1955).
47. *See* Board of Educ. of Asbury Park v. Asbury Park Educ. Ass'n, 368 A.2d 396 (N.J. Super. Ct. 1976) (illegal strike); Blair v. Robstown Indep. School Dist., 556 F.2d 1331 (5th Cir. 1977) (insubordination).
48. District 300 Educ. Ass'n v. Board of Educ., 334 N.E.2d 165 (Ill. App. 1975).
49. Riley Cty. Educ. Ass'n v. Unified School Dist., 592 P.2d 87 (Kan. 1979).
50. Jones v. Alabama State Tenure Comm'n, 408 So. 2d 145 (Ala. Civ. App. 1981).
51. See Chapters 8 and 9 *infra*.
52. Schmidt v. Unified School Dist. No. 497, 644 P.2d 396 (Kan. 1982).
53. Carpenter v. Board of Educ. of Owsley Cty., 582 S.W.2d 645 (Ky. 1979).
54. Duncan v. Reorganized School Dist. No. R-1, 617 S.W.2d 571 (Mo. App. 1981).
55. Smith v. Birmingham Bd. of Educ., 403 So. 2d 226 (Ala. 1981).
56. School Directors of Dist. U-46 v. Kossoff, 419 N.E.2d 658 (Ill. App. 1981).
57. Wooten v. Clifton Forge School Bd., 655 F.2d 552 (4th Cir. 1981).
58. McManus v. Independent School Dist., 321 N.W.2d 891 (Minn. 1982).
59. Floyd v. Board of Educ. of Greenup, 598 S.W.2d 460 (Ky. App. 1979).
60. *See* School Comm. of Providence v. Board of Regents for Educ., 429 A.2d 1297 (R.I. 1981); Pottsville Area School Dist. v. Marteslo, 423 A.2d 1336 (Pa. Commw. 1980). *But see* Robins v. Blaney, 451 N.Y.S.2d 853 (Sup. Ct. App. Div. 1982).
61. *See* Corrigan v. Donilon, 433 A.2d 198 (R.I. 1981); Johnson v. Board of Educ., 423 N.E.2d 903 (Ill. 1981).

62. Pottsville Area School Dist. v. Marteslo, 423 A.2d 1336 (Pa. Commw. 1980).
63. Spiewak v. Rutherford Bd. of Educ., 447 A.2d 120 (N.J. 1982).
64. Matthews v. Nyquist, 412 N.Y.S.2d 501 (Sup. Ct. App. Div. 1979).
65. Elsberg v. Board of Educ., 418 N.Y.S.2d 273 (Sup. Ct. 1979).
66. Farrington v. School Comm. of Cambridge, 402 N.E.2d 98 (Mass. App. 1980).
67. Johnson v. Board of Educ. of Decatur, 409 N.E.2d 139 (Ill. App. 1980).
68. Mish v. Tempe School Dist. No. 3, 609 P.2d 73 (Ariz. App. 1980).
69. Davis v. Wasco Intermediate Educ. Dist., 593 P.2d 1152 (Ore. 1979).
70. Cox v. Perkins, 585 S.W.2d 590 (Tenn. 1979).
71. Board of Educ. v. Cunningham, 317 N.W.2d 638 (Mich. App. 1982).
72. Bruton v. Ames Commun. School Dist., 291 N.W.2d 351 (Iowa 1980).
73. Meachan v. Montgomery Cty. Bd. of Educ., 267 S.E.2d 349 (N.C. App. 1980).
74. *See, e.g.*, Dobervich v. Central Cass Pub. School Dist., 302 N.W.2d 745 (N.D. 1981); Eskew v. Kanawha Cty. Bd. of Educ., 280 S.E.2d 297 (W.Va. 1981).
75. McNamara v. Commissioner of Educ., 436 N.Y.S.2d 406 (Sup. Ct. App. Div. 1981).
76. Buchan v. Las Vigenes Unified School Dist., 177 Cal. Rptr. 788 (Cal. App. 1981).
77. Craddock v. Board of Educ. of Annawan Commun. Unit School Dist., 405 N.E.2d 794 (Ill. 1980).
78. Sarro v. New York City Bd. of Educ., 419 N.Y.S.2d 483, 487 (1979).
79. McWhirter v. Cherokee Cty. School Dist., 261 S.E.2d 157 (S.C. 1979).
80. Fike v. Catalina-Foothills School Dist., 589 P.2d 1317 (Ariz. App. 1978).
81. Belluardo v. Board of Educ., 414 N.Y.S.2d 29 (Sup. Ct. App. Div. 1979); Bali v. Board of Educ., 416 N.Y.S.2d 933 (Sup. Ct. App. Div. 1979).
82. Jefferson Cty. DuBois Area Voc.-Tech. Dist. Schools v. Horton, 413 A.2d 36 (Pa. Commw. 1980).
83. Rockdale Cty. School Dist. v. Weil, 266 S.E.2d 919 (Ga. 1980).
84. School Dist. of York v. Allison, 406 A.2d 1197 (Pa. Commw. 1979).
85. Doherty v. School Comm. of Boston, 384 N.E.2d 228 (Mass. App. 1979).
86. Berkner v. School Bd. of Orange Cty., 373 So. 2d 54 (Fla. Dist. Ct. App. 1979).
87. McKenna v. Sumner Cty. Bd. of Educ., 574 S.W.2d 527 (Tenn. 1978).
88. Frison v. Franklin Cty. Bd. of Educ., 596 F.2d 1192 (4th Cir. 1979).
89. Reichert v. Draud, 511 F. Supp. 679 (E.D. Ky. 1981).
90. Bishop v. Keystone Area Educ. Agency, 311 N.W.2d 279 (Iowa 1981).
91. Riforgiato v. Board of Educ., 448 N.Y.S.2d 74 (Sup. Ct. App. Div. 1982).